SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-842

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Tiidee Products, Inc. (herein "Tiidee" or "the Company") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 28, 1974.

OPINIONS BELOW

The decision of the Court of Appeals for the District of Columbia Circuit (A130-169), *cert. before judgment denied*, 417 U. S. 921 (May 28, 1974), *reh. denied*, August 29, 1974 (A165-169), is reported at 502 F. 2d 349 and reprinted

at A130-A154. This decision enforced, as modified, the supplemental decisions and orders of the National Labor Relations Board (herein "the Board") reported at 194 NLRB 1234 (1972) (A77-91) and 196 NLRB 158 (1972) (A92-100). The original decisions of the Court of Appeals and of the Board are reported, respectively, at 426 F. 2d 1243 (D. C. Cir. 1970) (A103-125), *cert. denied*, 400 U. S. 950 (1970); 440 F. 2d 298 (D. C. Cir. 1970) (A126-129); 174 NLRB 705 (1969) (A1-41) and 176 NLRB 969 (1969) (A42-76).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit (A155-164) was entered on June 28, 1974. Timely petitions for rehearing and rehearing *en banc* were denied on August 29, 1974 (A165-169). On November 19, 1974, this Court entered an order (A170) extending the time for filing a petition for writ of certiorari to January 8, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Board has the authority, under the National Labor Relations Act, 29 U. S. C. § 158, *et seq.* (herein "the Act"), to order a respondent to reimburse a charging party for expenses, including attorney fees, incurred in the investigation, preparation, presentation and conduct of an unfair labor practice proceeding.

2. Assuming *arguendo* the authority to impose such a reimbursement remedy, may that remedy be imposed for the first and only time in the history of the Act to penalize a respondent for legitimately invoking the only method available to test a Board representation election decision.

STATUTE INVOLVED

The portion of the Act relevant to this case, Section 10(c), is set forth in the Appendix (A171).

STATEMENT OF THE CASE

This case presents a question of critical importance to the administration of the Act which was expressly left undecided by this Court in *N. L. R. B.* v. *Food Store Employees Union*, 417 U. S. 1, 8 n. 9 (1974), i.e., "whether the Board's broad powers under § 10(c), 29 U. S. C. § 160(c), to fashion remedies includes power to order reimbursement of litigation expenses . . ." The present case involves the first and only[1] time in the 39-year history of the Board that it has imposed such an extraordinary remedy. The long and tortured genesis of this unique situation is set forth below.

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1. In all of the following cases, *which were decided subsequent to the present case*, the Board denied a reimbursement remedy: *John Singer, Inc.*, 197 NLRB No. 7 (1972)—reimbursement denied even though the Board held that the respondent's defenses were "patently frivolous" and that any further litigation would be "an abuse of the processes of the Board and the courts"; *International Transportation Co.*, 199 NLRB No. 89 (1972)—no reimbursement remedy even though the Board found extensive violations of the Act warranting the imposition of a bargaining order; *Terri-Flex Products, Inc.*, 200 NLRB No. 2 (1972)—no reimbursement remedy despite a finding that the respondent's defenses were without merit; *Fugua Homes Missouri, Inc.*, 201 NLRB No. 13 (1973)—reimbursement denied even though the Board found that the respondent had engaged in "extensive and pervasive" violations of the Act; *Cook Construction Co.*, 203 NLRB No. 6 (1973)—in denying reimbursement the Board relied, *inter alia*, on the respondent's unfamiliarity with Board procedures, a factor which is present in the instant case; *Federal Prescription Services, Inc.*, 203 NLRB No. 145 (1973), *enf'd*, 496 F. 2d 813 (8th Cir. 1974)—denial of a reimbursement remedy even though the Board found that the respondent had engaged in "pervasive and aggravated" violations of the Act; *Orion Corp.*, 210 NLRB No. 71 (1974)—reimbursement not granted despite the Board's finding that the respondent acted in bad faith and failed to assert a meritorious defense for its actions; *Overland Hauling, Inc.*,

1. The Initial Board Decisions

In *Tiidee I*, 174 NLRB 705 (1969) (A1-41), the Board found that the Company had violated Sections 8(a)(1), (3) and (5) of the Act. The 8(a)(5) violation consisted of an improper refusal to bargain with the International Union of Electrical, Radio and Machine Workers, AFL-CIO (herein "the Union") following its selection by a majority of the voters in a Board-conducted election.[2] To remedy these violations the Board ordered the Company to cease and desist from such unlawful conduct, to bargain with the Union, to post an appropriate notice and to engage in other affirmative acts. Although the Board rejected the Union's request for a proposed "make-whole" remedy,[3] it did issue an unusually broad order forbidding the

209 NLRB No. 137 (1974)—denial of reimbursement to the *charged party* in a case where the charging party withdrew its charges after the Board ordered a rehearing; *Teamsters, Local 901 (F. F. Instrument Corp.)*, 210 NLRB No. 153 (1974)—no reimbursement even though the Board stated that any further litigation "would constitute an abuse of the processes of the Board and the courts"; and *Heck's, Inc.*, 215 NLRB No. 142 (1974)— reimbursement denied upon remand of *Food Store Employees, supra*, where the respondent's defenses were deemed "debatable", not "trivolous".

2. The refusal to bargain was predicated on Tiidee's original position which was asserted at the Board level only when the Company, a small Ohio employer, was not represented by counsel. This contention, that the Board's Regional Director should have held a hearing prior to administratively dismissing the Company's objections to the election, was rejected by the Director and not subject to direct Board review (A3-7). A refusal to bargain was the only means whereby the Company could judicially contest the Regional Director's decision. See, e.g., *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 481 (1964), and the discussion at pp. 14-15, *infra*.

3. The Union's proposed "make-whole" remedy, rejected by the Board throughout these proceedings and eventually also denied by the Court of Appeals (A147-150), would have required the Company to pay an amount equal to the alleged "losses incurred by employees based on what [it is assumed] would have been agreed upon had the employer bargained lawfully [and] . . . losses [allegedly] incurred by the Union for initiation fees and dues as well as [its organizational expenses] in securing certification." Legal Department Report to Convention of International Union of Electrical Workers, 172 Daily Lab. Rep. E-1, E-3 (BNA, Sept. 3, 1970). For a further

Company from infringing *in any manner* upon the rights guaranteed in Section 7 of the Act.

Prior to appellate review of *Tiidee I*, the Board, in *Tiidee II*, 176 NLRB 969 (1969) (A42-69), found, *inter alia*, that the Company engaged in additional violations of Section 8(a)(5) by the unilateral promulgation of work rules and hiring procedures.[4]

2. The Initial Judicial Litigation

The Union petitioned the District of Columbia Court of Appeals in *Tiidee I* to review the Board's refusal to grant its request for additional relief and the Board cross-petitioned for enforcement of its order. The Company did not contest then, nor has it contested thereafter, the Board's 8(a)(5) order.[5] On April 3, 1970, the Court of Appeals enforced the Board's order and, over the dissent of Circuit Judge MacKinnon, concluded that the Board "had not proved a sufficient justification" for its refusal to award an additional 8(a)(5) remedy. This view was predicated on the belief that, although the Board itself had made no such finding, the Company's refusal to bargain was a "clear and flagrant" violation of the Act and that its objections to the election were "patently frivolous". 426 F. 2d at 1248 (A109). The case, as a result, was remanded to the Board "with a direc-

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statement of what the Union contemplated by a "make-whole" remedy, see Judge MacKinnon's dissenting opinion in *Tiidee I*, 426 F. 2d at 1254 (A119-125).

4. The Company was still unrepresented by counsel in this succeeding round of litigation. It had therefore continued to act unilaterally on the mistaken assumption that the Union's certification was invalid. See n. 2, *supra*.

5. Upon the commencement of litigation before the Court of Appeals, the Company engaged counsel who advised that it comply with the Board's bargaining order. As a result, the Company stipulated to the 8(a)(5) violation in its brief to the Court and, following issuance of the Court's decision, promptly notified the Board of its desire to comply fully with the affirmative and negative provisions of its order. The Board, however, indicated that no compliance proceedings would be initiated until the completion of litigation although voluntary efforts were not prohibited—a suggestion which the Company readily adopted.

tive to make supplementary findings in the event the Board determines on remand that it should not grant any make-whole relief, in whole or in part . . . [or] believes that alternative remedies, beyond those already granted, are more appropriate". 426 F. 2d at 1253 (A118-119).[6] The principal question thus became, and remained until the Board's supplemental decisions, an issue interjected solely by the Union: whether the Board was empowered to grant a "make-whole" remedy and/or other unprecedented remedies, and, if so, whether and to what degree such remedies were appropriate in the circumstances of this case.

A critical decision in resolving this question is *H. K. Porter Company* v. *N. L. R. B.*, 397 U. S. 99 (1970), which issued in the interval between oral argument and the initial decision by the Court of Appeals. The Company, therefore, petitioned the Court to reconsider its position in light of a full expression of the parties' views with respect to *Porter* as well as the Board's intervening decision in *Ex-Cell-O Corporation*, 185 NLRB 107 (1970), *sum. rev'd.* and *rem'd. sub. nom. U. A. W.* v. *N. L. R. B.*, 449 F. 2d 1046 (D. C. Cir. 1971), *rem'd vac't* and *dec. enf'd.*, 449 F. 2d 1058 (D. C. Cir. 1971), where the Board expressly rejected the Court majority's views in *Tiidee I* and concluded that, by virtue of *Porter* and section 8(d) of the Act, it had no authority to issue a "make-whole" remedy. These petitions were denied on September 21, 1970, the Court noting that the Company had filed a petition for certiorari to this Court on the remedial issue. The petition for certiorari, supported by the

6. The Court's December 23, 1970 decision in *Tiidee II* (440 F. 2d 298), issued by the same majority again over Judge MacKinnon's dissent, remanded that case to the Board "for further consideration of the make-whole claim in light of . . . *Tiidee I*". Judge MacKinnon argued: (1) "the Board already has ample power under the remand by the majority in *Tiidee I* to grant all necessary remedial relief that is requested here"; (2) "this is not as strong a case as *Tiidee I* for the make-whole relief requested . . ."; and (3) "the majority are remanding the case here on the remedial relief question principally because of the cumulative effect of the facts here . . ." 440 F. 2d at 299 (A129).

Union and opposed by the Board on the basis that the case "was not ripe for review" (Memorandum in Opp. in S. Ct. No. 654, O. T. 1970, p. 3), was denied, Mr. Justice Stewart being of the opinion that certiorari should be granted, by this Court on December 7, 1970. 400 U. S. 950.

3. The Board's Supplemental Decisions On Remand

Despite the Company's persistent efforts to have the remand expeditiously resolved, the Board's supplemental decision in *Tiidee I* did not issue until January 21, 1972, more than a year subsequent to the denial of certiorari, and the supplemental decision in *Tiidee II* was further delayed until April 6, 1972. In *Tiidee I*, the Board, while again finding that it could not and should not order a "make-whole" remedy, adopted *pro forma* the Court's characterization of Tiidee as a frivolous litigator and granted additional 8(a)(5) remedies[7] including a requirement that the Company "reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases . . . in both the Board and court proceedings." 194 NLRB 1234 (A85). The Board subsequently refused to reconsider this decision although, as the Company urged in its post-decision motion, the award of litigation expenses had never been argued, except peripherally, in any of these lengthy proceedings, had not been urged as appropriate relief by the Board's General Counsel, and was inconsistent with the Board's then-current opinion in *Food Store Employees* (191 NLRB 886 (1971)) in which it refused to impose such a remedy. The Board, moreover, over the dissent of Chairman

7. Such additional remedies included the obligation that the Company (1) mail copies of the Board notice to each unit employee at his home; (2) that the Union be given reasonable access to the Company's bulletin boards during the period of contract negotiations; and (3) that the Company furnish the Union with a list of the names and addresses of its employees and keep said list current for a one year period (A86). These further remedies were affirmed below (A133-134).

Miller and reluctant concurrence of Member Kennedy,[8] subsequently extended its *Tiidee I* remedy to *Tiidee II* on the basis that, notwithstanding a prior determination that there was "no merit" to a motion to consolidate the two cases (A78, n. 3), the proceedings were nevertheless so "inextricably intertwined . . . as to require the conclusion that it was part of the same pattern of . . . litigation." 196 NLRB 158 (A94).

4. The Subsequent Judicial Litigation

Petitions to review the Board's supplemental decisions were thereafter filed by both the Company and the Union in the District of Columbia Court of Appeals. Prior to decision, another panel of that Court reversed the Board's opinion in *Food Store Employees* (476 F. 2d 546 (1973)) and, predicated on the Board's supplemental decisions in *Tiidee,* imposed *sua sponte* a reimbursement order. The Court of Appeals' subsequent opinion in the present case (A130-A164) held that, since the decision in *Food Store Employees* had conclusively established the Board's power to grant a reimbursement remedy, "debate in this circuit has been foreclosed" (A135; see also A138 and 141),[9] and enforced the Board's order granting litigation expenses (A134-141). The relief granted by the Board was modified, however, to delete any reimbursement to the Board because, unlike the respondent in *Food Store Employees,* Tiidee was a "stranger to the processes of the Board" (A143), and to limit reimbursement to the Union to only those expenses incurred in litigating the initial

8. In Chairman Miller's opinion the imposition of litigation expenses in *Tiidee II* was wholly unwarranted since there was no finding that "the defense here was asserted frivolously . . . [The Company's] unfair labor practices . . . are no more extensive than those committed by both unions and employers in a considerable percentage of the 800 or so cases we review each year" (A97). Member Kennedy concurred in the litigation reimbursement remedy only because he believed such a result was compelled by the "law of the case" once the Board had accepted the remand (A95, n. 8).

9. The Court noted the "disturbing circularity of this approach —the Board reacted to the strong remand in *Tiidee I* by imposing attorney fees, *Food Store* then relied on the Board's supplemental

cases before the Board (A141-147).[10] The Court also affirmed the Board's refusal to impose a "make-whole" remedy or to reimburse the Union for alleged additional organizational costs. (A147-152).

Judge MacKinnon set forth at length his separate views on the Board's authority to award attorney fees. He observed that justification for such an award cannot be premised on either the language of Section 10(c), any inherent Board equitable powers or even the underlying policies of the Act (A135, n. *; and see also A144, n. * * *). Judge MacKinnon was also of the belief that the Company's actions could not fairly be characterized as "frivolous" but, conversely, that it had legitimate grounds for its election objections (A139, n. * *).

On May 20, 1974, this Court issued its decision in *Food Store Employees,* 417 U. S. 1 (1974)[11] in which it found that the Court of Appeals had improperly exercised its authority by *sua sponte* imposing a reimbursement remedy, and remanded that case to the Board to determine whether to impose such a remedy and to resolve the "facial inconsistencies" between the Board's opinion in that case and the instant case.[12] Thereafter,

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decision in *Tiidee I* after our remand, and now we, in *Tiidee III,* rely in large part on the precedent established by *Food Store* to sustain the imposition of attorney fees and other litigation expenses." A138, n. 16.

10. The Board's extension of the reimbursement remedy to *Tiidee II* was affirmed, although the Court recognized "that the Company's legal position in *Tiidee II* cannot be fairly characterized as frivolous", since it was concluded that such an award was also encompassed by the *Food Store Employees* rationale (A147).

11. Tiidee's and the Union's petitions for certiorari before judgment, in order to permit consideration of the present case in conjunction with *Food Store Employees,* were denied by this Court on May 28, 1974. 417 U. S. 921.

12. On December 16, 1974, the Board issued its second supplemental decision in *Food Store Employees,* 215 NLRB No. 142, in which it announced that its decision in *Tiidee* "did not reflect a change in our existing policy" and attempted to explain the "facial inconsistencies" by stating that it would not impose a reimbursement of litigation expenses remedy where a respondent's defenses were "debatable" rather than "frivolous" (Sl. Op., pp. 2, 8 and 9).

both the Company and the Union filed petitions for rehearing with the Court of Appeals since the predicate of *Food Store Employees* as "the law of the case" had now apparently been removed. On August 29, 1974, the Court declined to rehear the case (A165-169).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents an Issue of Critical Importance in the Administration of the National Labor Relations Act Which Was Expressly Left Unanswered by This Court in Food Store Employees

This issue presented in this case—whether the Board has the authority to impose a remedy requiring a respondent to reimburse a charging party for litigation expenses—was expressly left undecided by this Court in *Food Store Employees* (417 U. S. at 7, n. 9). In the present case, however, unlike *Food Store Employees,* this critical question is now ripe for adjudication. The Board has here imposed such a remedy in this case and that remedy has been enforced by the Court of Appeals.

Although Tiidee is, to date, the only respondent in the history of the Act to be subjected to a reimbursement remedy (see n. 1, *supra*), a determination of the Board's power to grant this remedy is of critical importance to all persons who are, or may hereafter be, charged with the commission of unfair labor practices. The issue is one which, in other contexts,[13] this Court has repeatedly deemed worthy of review. It is surely of similar recurrent and far-reaching significance in proceedings under the Labor Act. This is particularly so since, under Section 10(f) of the Act, any person aggrieved by a final order of the Board may file a petition for review in the District of Columbia

13. See, *e.g., F. D. Rich Co.* v. *Industrial Lumber Co.,* 417 U. S. 116 (1974); *Hall* v. *Cole,* 412 U. S. 1 (1973); *Mills* v. *Electric Auto-Lite Co.,* 396 U. S. 375 (1970); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U. S. 714 (1967); and *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 (1939).

Circuit which is the original proponent and sponsor of this unprecedented remedy. The propriety of the severe dislocation in the Act occasioned by this long-disputed matter warrants resolution by this Court. The instant case, unlike *Food Stores Employees*, is in an appropriate posture to provide such a resolution.

2. The Board Has No Authority to Order the Reimbursement of Litigation Expenses

The award of litigation costs and attorney fees in the present case is a significant deviation from the long-established "American Rule" governing such a remedy—"that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 716 (1967); see also *Hall* v. *Cole*, 412 U. S. 1 (1973). Here, as in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U. S. 116, 126 (1974), where this Court refused to approve such an award, there is "no contractual provision concerning attorneys' fees in this case" and the Act does not "explicitly provide for an award of attorneys fees to a successful plaintiff."

A. The Board is an administrative agency created by statute, and, accordingly, its authority to impose a reimbursement remedy must be expressly granted by that statute. However, unlike other statutes[14] which contain *explicit* provisions for the award of

14. See, *e.g.*, Interstate Commerce Act, § 16, 49 U. S. C. § 16 (2); Clayton Act § 4, 15 U. S. C. § 15; Packers and Stockyards Act, 1921 § 309(f), 7 U. S. C. § 210(f); Perishable Agricultural Commodities Act § 7(b), 7 U. S. C. § 499g(b); Trust Indenture Act of 1939 § 323(a), 15 U. S. C. § 77www(a); Securities Act of 1933 § 11(e), 15 U. S. C. § 77K(e); Securities Exchange Act of 1934 §§ 9(e), 18(a), 15 U. S. C. §§ 78I(e), 78r(a); Copyright Act § 116, 17 U. S. C. § 116; Fair Labor Standards Act of 1938 § 16(b), 29 U. S. C. § 216(b); Servicemen's Readjustment Act § 1822(b), 38 U. S. C. § 1822(b); Civil Rights Act of 1964 § 706(k), 42 U. S. C. § 2000e-5(k); Railway Labor Act § 3(p), 45 U. S. C. § 153(p); and the Communications Act of 1934 § 206, 47 U. S. C. § 206. See also Judge MacKinnon's remarks at A135-6, n. *.

counsel fees, the Act is void of any such language or Congressional intent.[15] Indeed, even the substantially stronger language of Section 303 of the Act, which allows any person injured by an unlawful secondary boycott to "recover the damages by him sustained *and the cost of the suit*" (emphasis added), has been consistently construed as not authorizing the prevailing party to recover attorneys' fees. *Teamsters Local 20* v. *Morton*, 377 U. S. 252, 260, n. 16 (1964).

The Board's remedial powers "are limited to carrying out the policies of the Act itself." *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 108 (1970). The Board may not impose remedies which are punitive or which are imposed simply for their deterrent effect. *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 12 (1940). The taxing of counsel fees against a respondent because he acted in "bad faith" (or "frivolously") is, as the Board acknowledged in its decision (A85)[16] and this Court has recognized,

15. The legislative history of the Act contains no indication that Congress intended to grant the Board the power to impose such an extraordinary remedy. Thus, a specific provision permitting the Board to order violators to "pay damages", found in the Taft-Hartley Act as originally introduced (S. 2926, 73d Cong., 2d Sess. 1 Leg. Hist. of the Taft-Hartley Act, pp. 6-7), and an even milder provision allowing "restitution" (1 Leg. Hist. 2465), were later deleted following extensive hearings in both the House and Senate. The final version of the bill, as reported by both Congressional Committees, only authorized the Board ". . . to take such affirmative action, including reinstatement with or without backpay as will effectuate the policies of this Act." S. 1958, as reported, 2d Sen. Print, II Leg. Hist. 2905; see also, H. Conf. Rep. No. 510 at 54, 80th Cong., 1st Sess., II Leg. Hist. 2931. Similarly, in considering a proposal to give the Board authority to assess damages for breaches of collective bargaining agreements or in secondary boycott cases under the Taft-Hartley amendments, the chief sponsor of the bill, Senator Taft, noted that there then existed "no possibility of a suit for damages" under the Board's extant powers. 93 Cong. Rec. 4858 (1947).

16. In rationalizing that a reimbursement remedy will operate to free its dockets and allow speedy access to its processes (A84-85, 95), the Board ignored its own observation in *Ex-Cell-O*, 185 NLRB at 109, that:

> "we cannot agree that the application of a compensatory remedy in 8(a)(5) cases can be fashioned on the *subjective determination* that the position of one respondent is 'debatable' while

"of course, punitive", *Hall* v. *Cole*, 412 at 5, and, as Judge MacKinnon observed (A144, n. ***) thereby precluded by *Republic Steel*.

B. The policies which underlie the limited judicial exceptions to the Americon Rule are also inapplicable. This case does not involve contemptuous conduct occasioned by the willful disobedience of a court order as in the case relied on by the Board (*Schauffler* v. *United Association of Journeymen*, 246 F. 2d 867 (3rd Cir. 1957)); nor has the charging party here created a "common fund" for the benefit of itself as well as others (*Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 166 (1939)); nor is this a case where a "substantial benefit" has been created that would justify shifting litigation costs to the benefited class (*Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 397 (1970)); nor, finally, is a charging party before the Board acting in the role of a "private attorney general" (*Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 n. 4 (1968)). There is, in the instant case, no basis to apply any of these "limited exceptions" to the general rule disfavoring the award of attorneys' fees. *Hall* v. *Cole*, 412 U. S. at 5. The Board is also precluded from predicating such an award on the exercise of "traditional equitable power" for, as Judge MacKinnon properly observed (A136), administrative agencies, unlike federal courts, do not possess any inherent equitable powers. There should be, in order to sanction such an extraordinary

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that of another is 'frivolous'. What is debatable to the Board may appear frivolous to a court, and vice versa. Thus, the debatability of the employer's position in an 8(a)(5) case would itself become *a matter of intense litigation.*" [emphasis supplied.]

There are sound policy reasons for denying the Board the power to issue a reimbursement order; the time, expense and difficulties of litigation concerned with the award of counsel fees "would pose substantial burdens for judicial administration", *Fleischmann*, 386 U. S. at 718, and, as Judge MacKinnon noted, "greatly increase the number and complexity of cases before the Board . . . and add greatly to the Board's burdens." A138, n. *.

remedy, approval by this Court "to authorize the Board to order a remedy in which even the courts seldom indulge" (A138).

3. Even if the Board Is Authorized to Impose a Reimbursement Remedy, It Has Arbitrarily Exercised That Authority In the Instant Case

Assuming *arguendo* that the Board is authorized to grant a reimbursement remedy, it has acted arbitrarily here in the exercise of that authority. In its second supplemental decision in *Food Store Employees*, the Board announced a policy of ordering reimbursement of litigation costs only where a respondent's actions are "frivolous" and not "debatable". In this case, however, there was never a hearing held to engage in the "intense litigation" (see note 16, *supra*) required to determine whether Tiidee's actions were, in fact, "debatable" or "frivolous." There was, moreover, never even the opportunity to litigate generally the propriety of a reimbursement remedy which had not been sought by the Board's General Counsel, had not previously ever issued and was contrary to the Board's then-current policy. See pp. 7-8, *supra*.

There are in addition, numerous legitimate reasons which support the Company's actions in this case. Board representation decisions "are normally reviewable only where the dispute concerning the certification eventuates in a finding by the Board that an unfair labor practice has been committed" notwithstanding the "significant delays" imposed by this "indirect method of obtaining judicial review." *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 477-78 (1973). Tiidee had, as Judge MacKinnon described (A. 139-140, n. **), "a legitimate complaint against the Union . . . [and] a cogent argu[ment] that a hearing was necessary." In these circumstances, for the Company to invoke the only method available to challenge the Regional Director's refusal to hold such a hearing, cannot summarily be classified as not only "frivolous" but of such magnitude as to impose upon

the Company a remedy never before ordered in the history of the Act. If the touchstone of a remedy is its relationship to "proven unlawful conduct" (*N. L. R. B.* v. *Express Publishing Co,*. 312 U. S. 426, 433 (1941)), then surely Tiidee's relationship was substantially more removed than other employers who were not and have not been subjected to a similar penalty. See note 1, *supra.* The creation of such an unwarranted distinction requires, it is submitted, review by this Court.

CONCLUSION

For all the foregoing reasons, Tiidee respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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